UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In re	
DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)	**Docket No. 16-CRB-0003-PR (2018-2022)**

ORDER DENYING JOHNSON MOTION FOR REHEARING

The Copyright Royalty Judges (Judges) received the late-filed Motion for Rehearing (Motion) of George Johnson dba George Johnson Music Publishing.[1] The Motion seeks reconsideration of several findings and conclusions in the Initial Determination in the captioned matter. The time for filing a motion for rehearing is statutorily mandated. As such, the statutory deadline is jurisdictional and therefore the Judges **DENY** the delinquent Motion on that jurisdictional basis. 17 U.S.C. § 803(c)(2)(B).

In the interest of completeness, however, the Judges also address the substantive issues in the Motion and, as discussed below, find additional grounds for denying the Motion. Because of the late filing and for the reasons articulated herein, the Judges **DENY** the Motion.

I. Rehearing Standard

According to the Copyright Act, the Judges may, in exceptional circumstances and on such matters as the Judges deem appropriate, grant a motion of a participant and order a rehearing. *See* 17 U.S.C. 803(c)(2). The Judges may grant a motion for rehearing upon a showing that an aspect of the determination may be "erroneous." 37 C.F.R. § 353.1. The moving participant must identify the aspects of the determination that it believes are "without evidentiary support in the record or contrary to legal requirements." 37 C.F.R. § 353.2.

The Judges shall grant rehearing only "when (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct a clear error or prevent manifest injustice." *See, e.g., Order Denying Motion for Reh'g* at 1, Docket No. 2006-1 CRB DSTRA (Jan. 8, 2008) (*SDARS I Rehearing Order*) (applying federal district court standard under *Fed. R. Civ. P.* 59(e)).

A motion for rehearing "must be subject to a strict standard … to dissuade repetitive arguments on issues that have already been fully considered by the [Judges]." *Order Denying Motions for Reh'g*, Docket No. 2005-1 CRB DTRA, at 1-2 (Apr. 16, 2007). This holding is consistent with the position of the U.S. Supreme Court, holding that a rehearing or

[1] As an unrepresented party, Mr. Johnson was not entitled to review the unredacted version of the Initial Determination at issue; consequently, his time for filing a motion for rehearing was tolled until he received the redacted, public version of the Initial Determination.

reconsideration motion does not provide a vehicle "to re-litigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 2810.1 (2d ed. 1995)).

II. The Johnson Motion

In the Motion, Mr. Johnson does not argue new evidence or an intervening change in the law; rather, Mr. Johnson argues clear error and a need to correct asserted manifest injustice. Mr. Johnson has failed to establish error or injustice in any of the instances cited in the Motion.

A. Subpart A Regulations

Mr. Johnson protests that the Judges adopted regulations in subpart A of 37 C.F.R. part 385 on the basis of a settlement and without a hearing. Motion at 2. Mr. Johnson concedes that applicable authority permits[2] affected parties to negotiate rates and terms for the section 115 phonorecords license. The Judges received the agreed subpart A regulations and, following necessary procedure, published those proposed regulations for public comment. *See* 81 Fed. Reg. 48371 (Jul. 25, 2016). The Judges considered all parties' comments on the proposed rules and concluded that no participant in the proceeding made a sufficient showing that the agreed rules did not provide "a reasonable basis for setting statutory terms or rates." *See* 17 U.S.C. 801(b)(7). Indeed, Mr. Johnson filed a comment and various motions opposing the proposed regulations, all of which the Judges considered in approving the proposal.[3] Mr. Johnson's current assertion that the adopted rules are "grossly unfair" is both untimely and unavailing.

Mr. Johnson further protests that the Judges erred in not establishing the subpart A regulations *de novo.* Motion at 2-3. Mr. Johnson asserts that he "was under the impression that *all* rates are to be set *de novo.*" *Id.* at 3. Mr. Johnson offers no authority to support his assertion, and the Judges were well within their authority under the Copyright Act to adopt the proposed regulations. *See* 17 U.S.C. § 801(b)(7)(A).

B. Evidence

Mr. Johnson asserts that the Judges have not "allowed" Mr. Johnson's evidence in the present proceeding (or other proceedings in which Mr. Johnson has participated).[4] *Id*. Mr. Johnson's assertions regarding whether the Judges admitted evidence that he proffered are incorrect. Mr. Johnson appeared *pro se* in this and other proceedings. He is neither admitted to any bar nor trained as an attorney. *Id.* at 3-4. As such, in determining whether to admit evidence that Mr. Johnson proffered, the Judges considered that evidence in light of Mr. Johnson's status as a *pro se* party. The parties and the Judges agreed to accommodate Mr. Johnson by allowing him to make a statement in lieu of providing testimony with direct and cross examination.

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[2] Chapter 8 of the Copyright Act not only permits settlements, it is constructed to encourage settlement. *See* H.R. Rep. No. 408, 108th Cong., 2d Sess. 24 (Jan. 30, 2004); 17 U.S.C. § 115(c)(3)(E)(i) ("License agreements voluntarily negotiated … shall be given effect in lieu of any determination ….").

[3] *See* 82 FR 15297-98 (March 28, 2017) (determination adopting proposed regulations).

[4] Mr. Johnson's assertions regarding the Judges' treatment of his proffered evidence in other proceedings is not relevant in the current proceeding in determining whether the Judges should grant Mr. Johnson's motion for rehearing.

Objections to Mr. Johnson's testimony were submitted in writing. 03/09/17 Tr. 417. No other witness in the proceeding was given the same accommodation. Mr. Johnson nonetheless contends that because he was qualified by experience to offer expert subject matter testimony the Judges should have deemed all his proffered documentary evidence to be admissible for all purposes.[5]

Mr. Johnson has not shown that the Judges' discretionary evidentiary rulings were clearly erroneous or manifestly unjust.

C. Rate Standards

The Judges determine royalty rates for the section 115 phonorecords license according to a statutory standard. In setting section 115 license royalties, the Judges are directed to determine "reasonable rates and terms" calculated to achieve four enumerated policy objectives. *See* 17 U.S.C. 115(c)(3)(C); 801(b)(1).[6] Mr. Johnson asserts the Judges' failure to expressly consider the impact of monetary inflation on phonorecord royalty rates is error.

Monetary inflation is not an express factor for the Judges to consider in phonorecord license rate setting. The Judges are, however, expressly directed to consider rates and terms that have been voluntarily negotiated. *See* 17 U.S.C. 115(c)(3)(D). Rates and terms negotiated voluntarily in the marketplace are presumed to be made in the context of marketplace conditions, including monetary inflation over time. The Judges acknowledge current market conditions; they are not required to do an independent monetary study to determine whether those conditions accurately reflect inflationary forces.

The Judges did not err in failing to apply the monetary theories proffered by Mr. Johnson.

D. Constitutional Issues

Mr. Johnson presented three Constitutional arguments in the Motion. Mr. Johnson did not raise Constitutional issues in his written testimony, but presented each of these issues at the hearing and in his proposed findings and conclusions.[7] Mr. Johnson contends the Judges failed to consider the exclusive copyrights granted in the Constitution; that certain digital uses are copyright infringements and thus violative of a copyright owner's Constitutionally-mandated

[5] Mr. Johnson contends that he was accepted as an expert witness in songwriting in the current proceeding but points to no evidence that he proffered as a songwriter that the Judges failed to admit. *See* Motion at 4. Mr. Johnson points to evidence that he offered regarding historical inflation data, which he believes would have been a "reasonable basis" for setting statutory rates and terms. *Id*. Mr. Johnson provides no support for his argument that the Judges should have given any weight to his lay opinion about what would form a reasonable basis for setting royalty rates and terms. Mr. Johnson also contends that the Judges failed to admit evidence that Mr. Johnson proffered that was "the exact same evidence that the Services and other participants have successfully submitted." *Id*. at 3. Once the Judges admit a piece of evidence into the record, any participant in the proceeding may reference that evidence, as is often the case. In the interests of administrative efficiency, the Judges generally discourage parties from offering into evidence duplicative exhibits.

[6] The section 801(b)(1) policy objectives are to: (1) maximize availability of creative works to the public; (2) afford a copyright owner a fair return and a licensee a fair income; (3) reflect the relative contributions of the owner and user of the copyright with regard to technological contribution, capital investment, cost, risk, and the opening of new markets and development of new media for communication of the creative works; and (4) minimize any disruptive effect on the structure of the industry or generally prevailing industry practices. 17 U.S.C. 801(b)(1).

[7] In his proposed findings, Mr. Johnson did not cite the record in this proceeding. In his proposed conclusions, Mr. Johnson cited the U.S. Constitution and inapposite case authority.

exclusive rights, and that the rates the Judges set are "confiscatory."[8] Each of Mr. Johnson's Constitutional arguments fails.

Mr. Johnson asserts that the Judges erred by not considering the exclusive rights of U.S. songwriters and publishers under Article I, section 8, clause 8 of the Constitution.[9] Mr. Johnson acknowledges that songwriters' and publishers' copyrights are subject to the statutory compulsory licenses. Motion at 5. Mr. Johnson argues, however, that statutory provisions, freely negotiated agreements, and the legal precedent guiding the Judges' decisions in these proceedings are subordinate to the "natural right" described in Art. I, Sec. 8, cl. 8 of the Constitution.[10] In this proceeding, the Judges considered and rejected Mr. Johnson's Constitutional arguments. The Judges are tasked with valuing copyrights subject to the statutory compulsory license, a limitation on the exclusive copyright cited by Mr. Johnson.

Mr. Johnson asserts, without more, that "allowing" offline listening and limited downloads of renditions of musical works are examples of a "blatant copyright infringement and a violation of my exclusive rights." Motion at 6. Infringement actions are outside the limited authority of the Judges and, in any event, nothing in the record even suggests that the rates and terms established would create an infringement of copyright. Offline listening and limited downloads of renditions of musical works are among the exceptions to the creators' exclusive rights and are subject to a compulsory license. The Judges do not create the licenses; they administer those few that the Copyright Act authorizes them to administer.

Interpreting the rates under "Subpart B" (sic) of part 385[11] of the copyright regulations to be "literally $.00 cents," Mr. Johnson makes his final Constitutional argument, namely that those "zero" rates are confiscatory--a taking of property without just compensation. The Judges did determine royalty rates for promotional streaming, free-trial streaming, and "incidental deliveries" to be zero. Streaming services may choose to offer promotional and free-trial streaming as a part of their respective business models. So long as the service receives no monetary compensation for the streams, the royalty rate remains at zero. An incidental delivery is a temporary copy of a phonorecord made solely to facilitate delivery of the work by streaming. The minimal royalties of which Mr. Johnson complains are a result of sales or usage volumes,

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[8] Mr. Johnson cites only case authority for the confiscation argument, but in an abundance of caution, the Judges also interpret the argument as a "takings" argument. In his proposed findings of fact and conclusions of law, Mr. Johnson cited the Fifth Amendment's due process provisions as support for the takings argument. *See* George Johnson's (Mr. Johnson) Proposed Conclusions of Law and Findings of Fact at 40. He did not mention the concept in his written testimony, except in the context of his inflation argument. In oral testimony, Mr. Johnson conflated "constitutional exclusive rights" and his confiscation argument; neither of which was persuasive. *See* 3/9/17 Tr. at 200-03.

[9] "The Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries …." U.S. Const. Art. 1, sec. 8, cl. 8.

[10] Mr. Johnson makes reference to the "world's 3 largest music publishers" seemingly to imply that the Judges should consider corporate ownership or structure as a deciding factor in setting copyright licensing rates. *See* Motion at 5. Mr. Johnson cites no authority for this notion.

[11] Considering context, the Judges interpret this rehearing request as relating to the regulations regarding digital uses of musical works now found in subpart C of the regulations (they were formerly in subpart B). As set forth in the Determination, subpart B regulations relate to, *inter alia*, physical phonorecord deliveries, for which royalties are calculated on a per unit basis at 9.1 cents per unit. *See* 37 CFR 385, subpart B. Subpart C royalties for digital deliveries of various types are determined as a percent of the licensees' gross revenues. *See id*. at subpart C.

not an intentional discrimination against any particular copyright owner. Nothing about the rate structure is, with regard to any one copyright owner, confiscatory.[12]

GEO's repeated Constitutional arguments do not illustrate either clear error by the Judges or the imposition of a manifest injustice in the Initial Determination.

E. Factual Determinations

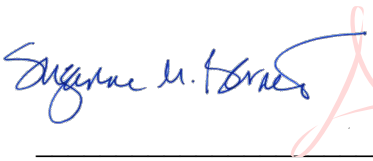
The remainder of Mr. Johnson's arguments relate to the Judges' factual determinations in the present proceeding. Mr. Johnson asserts that the Judges "should have" (1) adopted a per-play royalty rate, (2) considered, indeed adopted, Mr. Johnson's proposal to "suggest" a "BUY" button configuration[13] for licensees, (3) afforded more evidentiary weight to the effect of the statutory "shadow" on royalty rates, and (4) afforded more evidentiary weight to the substitutional effect (cannibalization) of music streaming as relates to sales of physical phonorecords or permanent digital downloads.

The Judges heard and considered all the evidence before them in this proceeding. It is solely within the purview of the Judges to determine what weight, if any, to accord any evidence. Mr. Johnson's disagreement with the Judges' evidentiary discretion is not an indication of either clear error or manifest injustice.

III. Conclusion

For all of the foregoing reasons, the Judges conclude that Mr. Johnson has failed to substantiate clear error or manifest injustice. Therefore, the Judges **DENY** the Motion.

SO ORDERED.



Suzanne M. Barnett
Chief Copyright Royalty Judge

Dated: June 6, 2018.

[12] Moreover, Mr. Johnson's "confiscation" argument proves too much. The Copyright Act includes numerous exceptions whereby a user may make uncompensated use of a copyrighted work without incurring liability for infringement. *See* 17 U.S.C. §§ 107-122. By Mr. Johnson's reckoning all of these provisions would be unconstitutional, notwithstanding substantial Supreme Court precedent applying these exceptions. *See, e.g., Harper & Row Pubs. v. Nation Enters.*, 471 U.S. 539, 547 (1985) ("The copyright owner's rights, however, are subject to certain statutory exceptions. Among these is § 107 which codifies the traditional privilege of other authors to make 'fair use' of an earlier writer's work.").

[13] On rehearing, Mr. Johnson maintains that his "BUY" button proposal was not an attempt to create a compulsory configuration, but rather that he sought to create a "voluntary opportunity" for licensees to offer that convenience to users. *See* Motion at 5-6. Nothing in the Initial Determination in any way prohibits parties from seizing a "voluntary opportunity" to monetize musical works offerings in any way they see fit. It is not within the Judges' authority to recommend business models to licensees.